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No. 95-397

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CLARA PENNY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a civil action for forfeiture of real property, the government's failure to provide the owner with notice and an adversary hearing before seizure of the property requires dismissal of the action.

2. Whether the government is permitted to present hearsay evidence when proving probable cause in a civil forfeiture action.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-29, is reported at 58 F.3d 1181. The opinion of the district court granting summary judgment for the government, Pet. App. 30-43, is reported at 843 F. Supp. 377. The opinion of the district court denying the claimants' motion for reconsideration, Pet. App. 44-51, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1995. The petition for a writ of certiorari

was filed on September 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1989, the United States initiated this in rem action in the United States District Court for the Northern District of Illinois seeking forfeiture of certain real and personal properties. Pet. App. 2. On the basis of the government's verified complaint and supporting affidavit, the district court determined that there was probable cause to believe that the property described in the complaint was subject to forfeiture under 21 U.S.C. 881(a)(6) and (7). The court granted the government's *ex parte* motion and executed a seizure warrant. Pet. App. 5-6.

The government's complaint alleged, *inter alia*, that the properties were the fruits of a large-scale narcotics trafficking operation run for the past decade by petitioner Clara Penny and her family. According to the complaint, the Pennys' modest legitimate reported income could not explain the acquisition of those assets or the Pennys' lavish lifestyle, and so there was probable cause to believe that the assets constituted proceeds of illicit drug transactions. Pet. App. 2-3.

Accompanying the complaint was the affidavit of Chicago, Illinois, Police Officer Lawrence Evans, a member of the local drug task force that had been investigating the Pennys for several years. Officer Evans reported information that he had received from two informants indicating that Jonathan Penny, the husband of Clara Penny, had been distributing multi-kilo quantities of cocaine since 1980, and had placed numerous properties purchased with drug proceeds in

his wife's name.[1] Officer Evans checked the titles to the Pennys' real estate and automobiles, which revealed that many of their assets were in the name of Clara Penny or petitioner West Side Building Corporation, of which Clara Penny is the sole director. A third source described to Officer Evans the elegant furnishings of the Pennys' home, and the expensive restoration of their other realty. Pet. App. 4-5.

The affidavit of Officer Evans also referred to police records of Jonathan Penny and his son Michael that corroborated their history of drug trafficking; to large deposits of cashier's checks made into the Pennys' bank and stock accounts in 1985 and 1986, and checks for $75,000 written to contractors working on the Pennys' property; and to the Pennys' tax returns which showed that Clara's paycheck as a mail handler was the couple's only legitimate income and that the couple's reported adjusted gross income was far less than their deposits in bank and stock accounts. Pet. App. 5.[2]

Clara Penny filed a verified claim to the property on behalf of herself and the West Side Building Corporation and requested dismissal of the complaint.

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[1] Following the instant forfeiture action, Jonathan Penny was indicted on federal drug trafficking charges. Pet. App. 6 n.6. He is not a party to this civil forfeiture action.

[2] In July 1991, the government filed an amended complaint and another supporting affidavit, also by Officer Evans, providing additional evidence of the nexus between the defendant properties and the Pennys' drug trafficking activities. Pet. App. 7. The district court found, however, that information in the original complaint and affidavit was sufficient to meet the government's probable cause threshold, and the court of appeals affirmed that finding. *Id.* at 18.

The district court denied the motion to dismiss, finding that the government's allegations were sufficiently detailed to comply with pleading requirements in forfeiture actions. Pet. App. 6. The court also declined to disturb its initial finding of probable cause. *Id.* at 7.

The government moved for summary judgment. The district court granted the motion on several grounds. The court noted that Clara Penny had in effect admitted the government's factual statements when she failed to respond to the government's motion by setting forth any facts that were in dispute as required by local rule. Pet. App. 8, 35. The court also noted that it had twice before found that the government had met its burden of demonstrating probable cause, thus shifting the burden of proof to the claimant, but that Clara Penny had done nothing to satisfy that burden. As for the various legal defenses that Penny raised, the court explained why each defense failed. *Id.* at 36-42. Accordingly, the court ordered the petitioner properties forfeited, pursuant to 21 U.S.C. 881(a)(4), (6) and (7). Pet. App. 43.

2. Clara Penny filed a motion for reconsideration, arguing, *inter alia*, that she was entitled to damages because the government had violated her due process rights by seizing her property without notice and hearing. Penny cited the intervening decision in *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), which held that the Due Process Clause requires the government, in the absence of exigent circumstances, to provide notice and a meaningful opportunity to be heard to the owner of real property before seizing the property in a civil forfeiture proceeding. The district court, however,

denied Penny's motion to reconsider and refused to reach the due process issue raised by *Good*. Pet. App. 44-51. The court stated that Penny was free to file a new lawsuit "seeking damages if she desires to pursue this course and is satisfied that *James Daniel Good* applies retroactively." *Id.* at 51.

3. The court of appeals affirmed in part and remanded in part. The court of appeals affirmed the district court's ruling that the petitioner properties were forfeitable under 21 U.S.C. 881(a)(4), (6) and (7). Pet. App. 1-29. The court of appeals held that the government may rely on hearsay evidence from informants to meet its initial burden of proving probable cause if the evidence is "sufficiently reliable and adequate * * * considering the informant's previous 'track record' and the totality of the circumstances." *Id.* at 18. The court noted that the burden then shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture. *Id.* at 18-19. The court concluded that, in this case, the government had clearly established probable cause and that Clara Penny, by failing to respond to the government's summary judgment statements as required by local rule, did nothing to rebut the government's showing.[3]

The court of appeals, however, remanded the case for further proceedings on the due process issue. The court held that *Good* applied retroactively to all cases not final on the date *Good* was issued. Pet. App. 22. The court also gave several instructions for the application of *Good*. First, because *Good* addressed

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[3] The court of appeals also noted that Penny did not appeal the district court's dismissal of any of the legal defenses she raised. Pet. App. 19.

only the forfeiture of real estate, the court of appeals left it for the district court to decide whether *Good* applies to the personal property named in the instant case. Second, since *Good* recognized that "exigent circumstances will excuse the necessity of a hearing," *id.* at 27 (citing 114 S. Ct. at 505), the court of appeals instructed the district court to consider any arguments by the government that exigent circumstances existed here, *ibid.*

Finally, on the issue of a potential remedy, the court of appeals explained that Clara Penny's motion raised not only the issue of damages, but also the contention that the failure to provide a pre-seizure adversary hearing nullified the entire forfeiture action, requiring its dismissal. Pet. App. 23-24. The court of appeals rejected the latter contention. In agreement with the majority of circuits that had considered the issue, the court held that "the illegal seizure does not, standing alone, require that the property be immune from forfeiture." *Id.* at 27. Thus, the court of appeals instructed that if exigent circumstances were not found, the district court was to "determine the damages, if any, suffered by the claimants * * * from the date of the seizure to the date of the first adversary hearing." *Id.* at 28.

ARGUMENT

1. Petitioners contend that this Court should resolve a conflict over whether, in light of *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), the government's seizure of forfeitable real property without a hearing requires dismissal of the government's forfeiture action. Pet. 10-13. Review of that issue is not warranted for several reasons.

a. Review by this Court would be premature. In *Good*, this Court held that, in a civil forfeiture action involving real property, the Due Process Clause generally requires the government to provide the property owner with notice and an opportunity to be heard before seizing the property. 114 S. Ct. at 505. But this Court also recognized, as an exception to that rule, that in some cases the presence of exigent circumstances could justify seizure through an *ex parte* motion. *Ibid.*

In this case, the district court had no opportunity to consider whether exigent circumstances could justify the absence of pre-seizure notice and hearing. Accordingly, the court of appeals remanded the case to the district court to decide the exigent circumstances issue. The district court's proceedings on remand are currently pending. If the district court finds that exigent circumstances justified the seizure in this case, and that finding is not reversed by the court of appeals, petitioners' question concerning the appropriate remedy for a *Good* violation would be moot. On the other hand, if the district court finds no exigent circumstances, and that holding is not reversed, petitioners may then present to this Court their claim that dismissal is the only possible remedy. Only then would the question of the appropriate remedy for a *Good* violation be ripe for review in this case.

b. Even if petitioners' claim were ripe for review, the court of appeals correctly held that failure to conduct a pre-seizure adversary hearing does not nullify the entire forfeiture action. As the Second, Third, Ninth, and Tenth Circuits have concluded, the failure to conduct a pre-seizure adversary hearing for the owner results in a temporary deprivation of the

owner's possessory interest in the property, but does not mean that the property is no longer subject to forfeiture. See *United States* v. *Real Property Located at 20832 Big Rock Drive*, 51 F.3d 1402, 1406 (9th Cir. 1995); *United States* v. *51 Pieces of Real Property*, 17 F.3d 1306, 1315-1316 (10th Cir. 1994); *United States* v. *Premises Known as RR # 1*, 14 F.3d 864, 869 n.5 (3d Cir. 1994); *United States* v. *Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265-1266 (2d Cir. 1989). If the owner suffers a loss as a result of the temporary deprivation, that loss can be compensated, for instance, by the award of any rents that have accrued during the period of the government's wrongful possession. See *20832 Big Rock Drive*, 51 F.3d at 1406; *51 Pieces of Real Property*, 17 F.3d at 1316.[4]

We note that the Eighth and Eleventh Circuits have concluded that a violation of *Good* requires dismissal of the forfeiture action with leave to file a new action if the statute of limitations has not run. See *United States* v. *2751 Peyton Woods Trail, S.W.*, 66 F.3d 1164 (11th Cir. 1995); *United States* v. *One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994). But, as the

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[4] These courts also hold that any evidence impermissibly obtained as a result of the illegal forfeiture should be excluded from the forfeiture proceeding. See *20832 Big Rock Drive*, 51 F.3d at 1406; *51 Pieces of Real Property*, 17 F.3d at 1316; *4492 South Livonia Road*, 889 F.2d at 1266. In the instant case, the courts below could not have relied on any impermissibly obtained evidence, despite petitioners' implication to the contrary (Pet. 12), since, as the courts found, the government satisfied its probable cause burden from the information contained in the original complaint and supporting affidavit. Pet. App. 18.

court below concluded: "It is the responsibility of the courts to construct a remedy for a constitutional violation that is tailored to the injury caused by the violation. *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ('[T]he scope of the remedy is determined by the nature and extent of the constitutional violation.')." Pet. App. 28. The remedy adopted by the Eighth and Eleventh Circuits is inconsistent with that principle, because it provides a windfall for the owner of the property in cases in which an adversary hearing would not have affected the ultimate conclusion that seizure was justified by probable cause. Cf. *United States* v. *Morrison*, 449 U.S. 361 (1981).

c. The conflict would not in any event call for this Court's review. A decision about the remedies available under *Good* is of little practical importance in future cases. It is now settled that the Due Process Clause requires the government, in the absence of exigent circumstances, to provide owners with notice and an opportunity to be heard before seizing real property that is subject to civil forfeiture. *Good*, 114 S. Ct. at 505. The United States has conformed its practices to that principle, and now routinely arranges for such pre-seizure adversary hearings. After the small and diminishing pool of cases that were pending on appeal when *Good* was decided are concluded, the appropriate remedy for a wrongful seizure should not be an issue of continuing importance.

2. Petitioners also contend (Pet. 13-14) that the government should be limited in its use of hearsay evidence to establish probable cause that the property is forfeitable, and in its use of hearsay evidence in the subsequent summary judgment forfeiture proceeding.

As the court below noted, the vast majority of circuits have held explicitly that the government may rely on hearsay evidence when proving probable cause in a forfeiture action.[5] The ruling that hearsay can be used to show probable cause is supported by this Court's holding in *Illinois* v. *Gates*, 462 U.S. 213, 241-242 (1983), that an affidavit may rely on hearsay to establish probable cause for a search warrant, when there is a substantial basis for crediting the hearsay. Petitioners dispute the lower court's finding of indicia of reliability surrounding the hearsay testimony of the government's confidential informants in this case, but that factbound determination does not warrant review by this Court.

Some courts have limited the use of hearsay evidence for purposes that go beyond establishing probable cause to initiate the seizure. For example, in *United States* v. *Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 622-623 (3d Cir. 1989), the court held that the government could not use hearsay evidence to rebut the affirmative defense of innocent ownership. In the instant case, however, no

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[5] See, *e.g.*, *United States* v. *One 1973 Rolls Royce*, 43 F.3d 794, 805 (3d Cir. 1994); *United States* v. *Daccarett*, 6 F.3d 37, 56 (2d Cir. 1993), cert. denied, 114 S. Ct. 1294, 1295, 1538 (1994); *United States* v. *One 1982 Chevrolet Corvette*, 976 F.2d 392, 392 (8th Cir. 1992); *United States* v. *One Parcel of Real Estate at 1012 Germantown Road*, 963 F.2d 1496, 1501 (11th Cir. 1992); *United States* v. *One 1986 Chevrolet Van*, 927 F.2d 39, 42 (1st Cir. 1991); *United States* v. *One 1987 Mercedes 560 SEL*, 919 F.2d 327, 331 (5th Cir. 1990); *United States* v. *One Parcel of Real Estate Located at 7715 Betsy Bruce Lane*, 906 F.2d 110, 113 (4th Cir. 1990); *United States* v. *Parcel of Real Property Known as 6109 Grubb Road*, 886 F.2d 618, 622 (3d Cir. 1989); *United States* v. *$5,644,540 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986).

use of hearsay evidence took place beyond establishing probable cause. Once probable cause was established, the burden shifted to petitioner Penny, and she offered no counter-evidence. Petitioners do not challenge the principle that "[i]f the claimant fails to rebut the government's proof, that showing of probable cause alone will support a judgment of forfeiture." Pet. App. 16 (citing cases). Moreover, the courts below held that Penny in effect admitted the factual statements in the government's motion for summary judgment by failing to set forth any facts that were in dispute as required by local rule. Petitioners do not contest that holding. Accordingly, this case is not a proper vehicle for addressing questions about the use of hearsay evidence after probable cause has been established.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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